

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B149C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

OFELIA SANCHEZ,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

The hearing in this matter was held on April 2 and 3, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through L. Louise Romero, senior university counsel. Complainant, Ofelia Sanchez, was present at the hearing and represented by Teri Lopez Guzman, attorney at law.

Respondent called the following witnesses to testify at hearing: Joan McConkey; Chris McCusker; Paul Tabolt; Hilary Waukau; James Manzanares; Abel Alvarado; Rose Villalobos; Ka Lee; John Madsen; and Kamph Sangkare. Respondent's exhibits 2 through 5, 7, 11 through 14, and 15 were admitted into evidence by stipulation of the parties. Respondent's exhibits 1 and 17 through 20 were admitted into evidence without objection. Respondent's exhibits 9 and 16 were admitted into evidence over objection. Respondent's exhibits 6, 10, and 12 were withdrawn.

Complainant did not testify at hearing nor did she call other witnesses to testify at hearing. The parties stipulated to the admission into evidence of complainant's exhibits A through G, J through M, and P through R. Complainant withdrew exhibits I and O.

MATTER APPEALED

Complainant appeals the termination of her employment from the University of Colorado at Boulder for wilful misconduct and failure to perform her job as a custodial supervisor.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.
2. Whether the conduct proven to have occurred constitutes wilful misconduct or failure to perform assigned duties.
3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.
4. Whether respondent is entitled to an award of attorney fees and cost under section 24-50-125.5 C.R.S (1988 Repl. Vol. 10B).

PRELIMINARY MATTERS

1. In case number 96G091, entitled Sanchez v. Department of Higher Education, filed March 8, 1996, complainant filed a grievance alleging discrimination based on race and gender. In case number 96B149, entitled Sanchez v. Department of Higher Education, filed April 11, 1996, complainant filed an appeal of the termination of her employment. Pursuant to section 24-4-105(4) C.R.S. (1988 Repl. Vol. 10A), the appeals were consolidated for the purposes of an investigation conducted by the Colorado Civil Right Division and for purposes of the hearing. The consolidated appeals are referenced under case number 96B149C.
2. Over objection, complainant was permitted to pursue her claim of retaliation on appeal to the ALJ as it was raised as an issue in her April 11, 1996, notice of appeal in case number 96B149.
3. Complainant's allegations of discrimination based on race and gender were investigated by the Colorado Civil Rights Division (CCRD). On December 5, 1996, the executive director of CCRD render a finding of "no probable cause" to credit complainant's allegations of discrimination.

FINDINGS OF FACT

1. Complainant Ofelia Sanchez (Sanchez) was employed by the University of Colorado at Boulder (CU-B) as a custodial supervisor. She was responsible for a crew of custodians who performed maintenance work on the CU-B campus. Sanchez was assigned approximately 16 employees to supervise.
2. John Madsen, assistant director of recycling and solid waste, was Sanchez' immediate supervisor. Paul Tabolt, director of

facilities management, is the appointing authority for Sanchez' position.

3. In August, 1995, John Madsen was advised that Sanchez was having an affair with one of her subordinates. Madsen was contacted by Jeanette Millan. Millan's husband, Adolpho Millan, worked under Sanchez' supervision on a custodial crew. Jeanette Millan worked for CU-B in the housing department.

4. Millan sought Madsen's assistance in ending the affair between Adolpho Millan and Sanchez. Madsen sought the assistance of his supervisor, Paul Tabolt. Together they determined that the affair was a matter outside their authority to act on, since the affair appeared to be between two consenting adults and was occurring outside of the work place.

5. In September, 1995, Sanchez reported that one of her subordinates, Rose Villalobos, walked off the job. Sanchez requested that an R8-3-3 meeting be held with Villalobos to determine whether disciplinary action should be imposed on her. An R8-3-3 meeting was held with Villalobos on September 22, 1995. Sanchez, John Madsen, Paul Tabolt, and Rose Villalobos were in attendance. During the meeting, Villalobos accused Sanchez of showing favoritism to Adolpho Millan. Villalobos explained that Millan and Sanchez are lovers. Sanchez responded strongly to this accusation. She threatened to sue Villalobos. Villalobos further explained that she did not walk off the job but was directed by Sanchez to leave the work place. No disciplinary action was taken against Villalobos.

6. Following the R8-3-3 meeting with Villalobos, Madsen wrote Sanchez instructing her to treat her subordinates equally and to supervise them fairly.

7. On numerous occasions prior to September, 1995, Madsen observed Adolpho Millan in Sanchez' assigned vehicle. He appeared to spend long periods of time in her vehicle instead of performing his duties as a custodian. Madsen informally counseled Sanchez on many occasions about driving subordinates around the campus during the performance of her duties.

8. In October, 1995, when Madsen discovered that Adolpho Millan sat in Sanchez' vehicle for two hours waiting for her to perform her supervisory duties, he again instructed her about the proper use of the vehicle. Madsen instructed Sanchez about when and under what circumstances Sanchez could drive her subordinates in her assigned truck.

9. In October, 1995, a draft sexual harassment policy was prepared to address the conduct of employees at CU-B. The draft sexual harassment policy required that supervisors report to their supervisor if they maintained a consensual personal relationship with a co-worker. For Sanchez' benefit, John Madsen reviewed this policy with all supervisors under his authority. Following adoption of the sexual harassment policy, in November, 1995, Sanchez did not report her relationship with Adolpho Millan.

10. Sanchez was on medical leave from October 30, 1995, to December, 1995.

11. A rare and valuable book collection is maintained at Norlin Library. These books are maintained in the library's special collection. Prior to February, 1996, in order to protect these books from water damage, special construction and security measures were undertaken to enclose a fire protection system in a valve room located near the special collection. Access to the room was denied to all except those with special security needs. Sanchez was not required to have access to this room. Sanchez and the custodial staff were not permitted to make use of this room for their maintenance needs.

12. On February 15, 1996, security personnel were touring the special collection area at Norlin Library. They entered the valve room and observed that a sofa was in the room. The room is very small and the sofa was tightly wedged into the room between a wall and an industrial wash basin. Following this observation on February 15, a security officer was directed to check the room daily to determine if it was being used and by whom. It was suspected that someone might be sleeping in the room.

13. On February 16, 1996, a security officer checked the room at 6:40 a.m. Listening outside the door of the room, it appeared uninhabited. The security officer pretended to leave the area near the door, but actually stood close by listening for sound from the valve room. At this point, the security officer heard noises coming from the valve room. The officer pretended to attempt to open the valve room with a key, although the officer had not been issued a key to the room.

14. A few minutes later, Adolpho Millan exited the darkened valve room. The security officer looked into the room, using the light from the hallway to illuminate the room. Sanchez was observed in the room standing on the sofa. She was pretending to wash the industrial wash basin in the room.

15. Paul Tabolt was advised that Sanchez and Millan were discovered in the valve room. On March 1, 1996, Sanchez was placed on administrative suspension with pay pending an investigation into her conduct. On March 7, 1996, Sanchez was provided notice that a Board Rule, R8-3-3 meeting would be held with her on March 11, 1996. Sanchez was provided notice that at the R8-3-3 meeting information would be exchanged about the following incidents: the discovery of Sanchez and her subordinate in the darkened valve room, allegations of inappropriate physical contact with her subordinate in the work place, Sanchez' preferential treatment of certain subordinates, and Sanchez' failure to report a consensual relationship with a subordinate.

16. Sanchez appeared at the R8-3-3 meeting with a representative. Sanchez denied the allegations of misconduct. She encouraged Tabolt to poll her subordinates about her treatment of them.

17. As requested, Madsen polled Sanchez' staff. The employees consistently reported that she showed preferential treatment to a small number of her staff, including Adolpho Millan. Staff reported that they were intimidated by Sanchez' management style.

18. One staff member polled by Madsen reported that he observed Millan and Sanchez in Sanchez' office during working hours laying naked one on top of the other on a sofa. Another employee reported that Sanchez and Millan were observed kissing in the work place during working hours. Another employee observed Millan and Sanchez in Sanchez' office with Millan sitting on Sanchez' lap.

19. Sanchez' staff was reticent to report her conduct. Many staff members are not native born United States citizens. Some have limited use of the English language. These facts contributed to the reason for their failure to report Sanchez' conduct previously.

20. Madsen reported the results of his poll to Tabolt. Tabolt convened a second R8-3-3 meeting. On March 11, 1996, Sanchez was given notice that a second R8-3-3 meeting would be held on March 13, 1996. At this meeting, Sanchez offered additional denials that she engaged in wilful misconduct or failed to perform her duties.

21. Tabolt considered the information he received concerning Sanchez' conduct, as well as the information provided during the R8-3-3 meetings. He concluded that those in custodial positions must be trustworthy because they have access to all areas of the University during periods when members of the public are present and during periods when the University is closed. He determined that based on the information received, Sanchez was not a trustworthy employee.

22. Tabolt held an R8-3-3 meeting with Millan during the same period of time that a meeting was held with Sanchez. Tabolt found that the employees told different stories about the reasons for their presence in the valve room on February 16, 1996. Sanchez claimed that she took Millan to the valve room so that she could yell at him. Millan claimed that Sanchez did not yell at him in the valve room. Sanchez claimed that she could hear the security officer place a key in the door lock to the valve room and that she stood by quietly trying to determine whether someone without authorization was gaining access to the room. Millan stated that he never heard a key in the valve room door. The conflicting information received from Sanchez and Millan contributed to Tabolt's belief that Sanchez was not giving a credible accounting of her actions.

23. Tabolt concluded that Sanchez violated the sexual harassment policy by failing to report her relationship with Millan. He concluded that Millan and Sanchez had an inappropriate sexual relationship in the work place. Tabolt further concluded that Sanchez gave preferential treatment to some of her staff, including Millan.

24. Tabolt determined that Sanchez' inappropriate relationship with Millan and her management style created an environment of fear and intimidation for her staff. As a result of these findings, despite Sanchez' good employment record, Tabolt terminated Sanchez' employment effective April 3, 1996.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden of proof to establish that complainant engaged in the conduct for which discipline was imposed, that the conduct proven to have occurred constitutes violation of State Personnel Board rules, and that the decision to terminate complainant's employment was neither arbitrary, capricious, nor contrary to rule or law. Respondent further contends that it is entitled to an award of attorney fees and costs under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

Complainant contends that respondent failed to sustain its burden of proof and therefore the discipline imposed should not be sustained.

Sufficient evidence, and the only evidence presented at hearing, established that complainant engaged in the conduct alleged to have occurred, that the conduct constituted violation of State Personnel Board rules, and that termination of complainant's employment was neither arbitrary, capricious, nor contrary to rule or law. Based on the testimony of respondent's numerous witnesses, complainant was engaged in an inappropriate sexual relationship on the job with one of her subordinates, she failed to report this relationship in accordance with the CU-B sexual harassment policy, she showed favoritism to some of her subordinates and she created an atmosphere among her subordinates of fear and intimidation. The decision to terminate complainant's employment was the choice of a sanction within the range available to a reasonable and prudent administrator.

During the two day hearing, complainant presented no evidence to support her claim that her termination was arbitrary, capricious, and contrary to rule and law. In fact, complainant's cross examination of respondent's witnesses had no redeeming value other than to support respondent's case against her. The evidence established that the appeal of the personnel action terminating complainant's employment was groundless under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B). Complainant had no basis for challenging the agency's action terminating her employment. She presented no defense, not even her own testimony. Coffey v. Colorado School of Mines, 870 P.2d 608 (Colo. App. 1993), cert. denied; Hartley v. Department of Corrections, Colorado Court of Appeals Case No. 96CA0183, ___ P.2d ___ (April 17, 1997); Jacqueline Williams v. Department of Human Services, case number 95B173.

A complainant who appeals a personnel action may be liable if he/she does not prevail at hearing. However, something more must

be shown than complainant's failure to persuade the trier of fact that the discipline imposed was arbitrary, capricious or contrary to rule or law.

This case, like Jacqueline Williams v. Department of Human Services, presents a unique circumstance. The complainant in each of these cases appealed a personnel action but elected not to present any information in their defense. These are not cases in which respondent's case was questionable and complainant's strategy is to require respondent to meet its burden of proof. In each of these cases, respondent presented an abundance of evidence of the complainants' misconduct. A complainant appealing such a personnel action should have some basis for their challenge and the basis should be made known at the hearing. Failure to do so justifies the determination that the appeal is groundless.

In this case, the appeal process was not used to vindicate complainant through the presentation of relevant evidence. The fact that complainant hired counsel to represent her in this matter might normally be acknowledged as evidence of the seriousness with which complainant viewed the need to present a strong defense. However, in this case, counsel did not appear to have any information from which to formulate a defense.

Furthermore, the parties stipulated to the admission of complainant's exhibits into evidence. These exhibits were duplicates of the exhibits offered by respondent or part of the State Personnel Board file. Complainant did not make use of these exhibits to establish the arbitrary or capricious nature of the appointing authority's action.

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that complainant engaged in the conduct for which discipline was imposed.
2. Respondent established that the conduct proven to have occurred constituted wilful misconduct and failure to perform assigned duties.
3. Respondent's decision to terminate complainant's employment was shown to be neither arbitrary, capricious, nor contrary to rule or law.
4. The appeal from which this action arose was groundless, thus respondent is entitled to an award of attorney fees and cost.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice. Respondent is awarded attorney fees and cost under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

DATED this _____ day of
May, 1997, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar

days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of _____, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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